A

PP

v.

KUMARAN KUNCHI RAMAN

B

COURT OF APPEAL, PUTRAJAYA
AZHAR MA'AH JCA
SYED AHMAD HELMY JCA
BALIA YUSOF WAHI J
[CRIMINAL APPEAL NO: J-05-181-2008]

C

30 MAY 2011

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Father killing daughter by dousing her with petrol and burning her - Acquittal and discharge - Appeal against - Whether respondent successfully raised*

D

defence of intoxication - Penal Code, ss. 85 and 86 - Whether trial judge erred - Whether there was reason to interfere with findings

The respondent was charged for the murder of his daughter under s. 302 of the Penal Code. He was alleged to have doused his

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daughter with petrol and burning her. At the conclusion of the trial, the learned trial judge found that the respondent had successfully raised the defence of intoxication under s. 85(2) of the Penal Code and with the finding that the respondent committed the act and further directed that the respondent be

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held in safe custody in a suitable place of detention. Against the said order, the Public Prosecutor filed this appeal. The issues that arose were (i) whether the trial judge had erred in law and in fact in holding that the respondent had successfully raised the defence of intoxication and fulfilled the pre-requisites of the defence as

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enshrined in ss. 85 and 86 of the Penal Code; (ii) whether the trial judge had erred in failing to consider that there was no cogent evidence to support the finding that the respondent was so intoxicated to the extent of not knowing that his acts were wrong in law.

H

Held (dismissing the appeal; affirming decision of High Court)
Per Balia Yusof Wahi J delivering the judgment of the court:

I

(1) On the drinking habits of the respondent, his wife (SP6) stated that on that fateful day the respondent had between 11am and 12.30pm consumed the contents of the bottle (exh. P4C) and his son SP7 had affirmed that the respondent

had also consumed the content of a bigger bottle at 7.30pm on the day before. During cross examination it was further elicited from SP6 that the respondent would not remember his erstwhile manners while under the influence of alcohol. According to the respondent's younger brother, DW3, the respondent had cried after he was handcuffed by the police and was asking why he was being arrested. Having considered and analysed the evidence, the learned trial judge found that the respondent was under the influence of alcohol and was drunk at the time when he committed the act and concluded that there was doubt as to whether the respondent in his intoxicated state could have formed the necessary intention or knowledge to constitute the offence of murder. Despite the absence of any medical evidence as to the level of intoxication of the respondent, there was sufficient evidence to support the trial judge's finding. (paras 4, 5, 14, 15 & 18)

(2) There was no justification to disturb the trial judge's finding that 'the respondent was most abnormal in his manner for if he had any realisation of his erstwhile act and the consequences thereof, then his manner could not be anything close to normal, could be seated in the hall as if nothing had happened.' The behaviour of the respondent was not only odd but strange taking into account the evidence of SP5, the respondent's long time neighbour, that the respondent was standing in front of the house and watching while SP5 was helping SP6 drag the deceased, whose body had caught fire, out of the car. DW2 testified that when he came over, the respondent was lying on the floor in the hall of the house and that he was 'tidak sedar macam mabuk-mabuk.' On being questioned by DW2 as to the whereabouts of his daughter, the respondent gave no reply and only 'buka mata dengan separuh-separuh.' This was a clear indication that the respondent was not conscious of his surroundings. (para 19)

(3) The testimony of SP5, SP6 and SP7 clearly indicated that the respondent was under the influence of alcohol at the material time of the offence. The totality of the conduct of the respondent was not consistent with one of guilt. Considering the evidence given by the respondent in his defence and the totality of the evidence together with that proffered by the prosecution, the respondent had discharged the burden placed

A on him. The trial judge had not erred in his assessment of the evidence and on the application of the correct principles of law. There was no reason to interfere with the finding. (paras 20, 24 & 25)

B ***Bahasa Malaysia*** *Translation Of Headnotes*

Responden dituduh dengan pertuduhan membunuh anak perempuannya di bawah s. 302 Kanun Keseksaan. Beliau didakwa telah menyimbah petrol ke atas anaknya lalu membakarnya. Pada akhir kes perbicaraan, yang arif hakim telah mendapati bahawa
C responden telah berjaya membangkitkan pembelaan mabuk di bawah s. 85(2) Kanun Keseksaan dengan memutuskan bahawa responden telah melakukan perbuatan tersebut dan seterusnya mengarahkan responden ditahan di bawah jagaan di tempat tahanan yang sesuai. Pihak Pendakwaraya memfailkan rayuan ini
D terhadap perintah tersebut. Isu-isu yang dibangkitkan adalah (i) sama ada hakim bicara telah salah dalam undang-undang dan fakta apabila memutuskan bahawa responden telah berjaya membangkitkan pembelaan mabuk dan telah memenuhi kehendak-
E kehendak pembelaan yang ditetapkan di dalam s. 85 dan 86 Kanun Keseksaan; (ii) sama ada hakim bicara telah khilaf apabila gagal mempertimbangkan bahawa tiada keterangan kukuh untuk menyokong dapatan bahawa responden terlalu mabuk sehingga tidak mengetahui tindakan-tindakannya itu salah dari segi undang-
F undang.

Diputuskan (menolak rayuan; mengesahkan keputusan Mahkamah Tinggi)
Oleh Balia Yusof Wahi H menyampaikan penghakiman mahkamah:

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(1) Mengenai tabiat minum arak responden, isterinya (SP6) menyatakan bahawa pada hari kejadian itu responden telah meminum arak dari botol (eks. P4C) di antara pukul 11 pagi dan 12.30 tengah hari dan anak lelakinya SP7 telah
H mengesahkan bahawa responden juga telah meminum arak dari botol yang lebih besar pada pukul 7.30 petang sehari sebelum kejadian. Semasa soal balas ia seterusnya diutarakan oleh SP6 bahawa responden tidak akan ingat adab-adabnya dahulu jika di bawah pengaruh alkohol. Menurut adik lelaki responden,
I DW3, responden telah menangis apabila beliau digari oleh pihak polis dan telah bertanya mengapa beliau ditahan. Setelah

keterangan dipertimbangkan dan dianalisis, yang arif hakim bicara telah mendapati bahawa responden berada di bawah pengaruh alkohol dan mabuk pada masa beliau telah melakukan perbuatan itu dan membuat kesimpulan bahawa terdapat keraguan sama ada responden di dalam keadaan mabuknya boleh membentuk niat atau pengetahuan yang diperlukan untuk membentuk kesalahan pembunuhan. Walaupun ketiadaan mana-mana keterangan perubatan mengenai tahap kemabukan responden, terdapat keterangan yang mencukupi untuk menyokong dapatan hakim bicara.

(2) Tiada justifikasi untuk mengganggu dapatan hakim bicara bahawa 'responden berkelakuan luar biasa kerana jika beliau mempunyai apa-apa kesedaran mengenai perbuatan dahulunya dan akibat-akibatnya, kelakuannya tidak boleh dikatakan normal, boleh duduk di rumahnya seperti tiada apa-apa yang berlaku.' Kelakuan responden bukan sahaja ganjil tetapi aneh mengambil kira keterangan SP5, jiran lama responden, bahawa responden telah berdiri di depan rumahnya dan hanya melihat SP5 menolong SP6 membawa simati, yang badannya sedang membakar, ke luar kereta. DW2 memberi keterangan bahawa apabila DW2 telah sampai ke rumah responden, responden sedang terbaring atas lantai rumahnya dan beliau dalam keadaan 'unconscious and drunk'. Apabila DW2 bertanya di mana anak perempuan responden, responden tidak memberi apa-apa jawapan dan hanya 'partly opened his eyes.' Ini adalah satu petunjuk jelas yang responden tidak sedar akan persekitarannya.

(3) Testimoni SP5, SP6 dan SP7 dengan jelasnya menunjukkan bahawa responden di bawah pengaruh alkohol pada masa kesalahan itu berlaku. Keseluruhan kelakuan responden tidak konsisten dengan kelakuan seseorang yang bersalah. Mempertimbangkan keterangan yang diberi oleh responden dalam pembelaannya dan keseluruhan keterangan bersama-sama dengan apa yang telah dihulurkan oleh pendakwaan, responden telah melepaskan beban yang terletak di atasnya. Hakim bicara tidak membuat kesilapan dalam penilaian keterangan dan dalam pemakaian prinsip-prinsip undang-undang. Tiada sebab untuk dapatan-dapatannya diganggui.

Case(s) referred to:
Chan Kwee Fong v. PP [2010] 3 CLJ 671 CA ***(refd)***
Chia Chan Bah Alias Chiah Ah San v. Rex [1938] 1 LNS 12 HC ***(refd)***
Francis Antonysamy v. PP [2005] 2 CLJ 481 FC ***(refd)***
PP v. Kenneth Fook Mun Lee & Another Appeal [2006] 1 CLJ 499 CA ***(refd)***

Legislation referred to:
Penal Code, ss. 85(2)(b), 86(2)

For the appellant - Mohd Abazafree (Aslinda Ahad with him) DPP; AG's Chambers
For the respondent - Abraham Mathew (Ramesh Vasan with him); M/s Sucha Singh & Co

[Appeal from High Court, Johor Bahru; Criminal Trial No: 45-8-2002]

[Editor's note: For the High Court judgment, please see PP v. Kumaran Kunchi Raman [2010] 3 CLJ 220.]

Reported by Suhainah Wahiduddin

JUDGMENT

Balia Yusof Wahi J:

Decision

[1] The respondent was charged for the murder of his daughter and the charge against him reads:

> Bahawa kamu pada 19 Ogos 2001, jam lebih kurang 3.00 petang di hadapan rumah no. 127A Jalan Kemuning, Ladang Ulu Remis, Layang-Layang, dalam daerah Kluang dalam Negeri Johor telah melakukan pembunuhan ke atas Malini a/p Kumaran no. KP 831003-01-6778, dengan ini kamu telah melakukan kesalahan di bawah seksyen 302 Kanun Keseksaan dan boleh dihukum di bawah pertuduhan yang sama.

[2] At the conclusion of the trial, the respondent was acquitted and discharged by the High Court on account of s. 85(2) of the Penal Code but with the finding that he committed the act and with a further direction that the respondent be held in safe custody in a suitable place of detention at the pleasure of His

Highness, the Sultan of Johor. Being dissatisfied with the decision, the public prosecutor has filed this appeal and having heard the same we dismiss the appeal and now give our reasons.

Facts Of The Case

[3] The relevant facts as narrated in the judgment of the learned trial judge are as follows:

> The accused, a tractor driver of Ladang Ulu Remis, was the husband of SP6 and the father of the deceased, SP7 and Kishen. All lived in a house provided by the employer.
>
> 18 August 2001 and 19 August 2001 were days for Hindu prayers and whence it was the Hindu practice to splash kunyit water on Hindus.
>
> 19 August 2001 (Sunday), the entire family was in the house. At about 12.30 p.m, the deceased, SP6 and SP7 had completed the household chores, adjourned to the hall and watched a Tamil movie being televised. At about 2.00 p.m, the accused awoke from sleep and entered the hall and "bising-bising kepada SP6." The testimony of SP6 states "OKT marah tanpa sebab, sebab dia mabuk."
>
> SP6 got out of the house, the accused followed and there they quarreled. About 10 minutes later, the accused re-entered the house and sat on the chair in the hall. The accused said that the deceased "Tidak berguna makan percuma dalam rumah, selalu minta bantuan ayah." The deceased walked to the exterior of the house where the accused "cakap bahasa kasar dalam BM" to the deceased. The deceased responded in kind. The accused picked up a piece of broken brick or stone and the deceased took a coconut from the ground and said "awak buang bata, saya pun buang kelapa." After that the accused "buang batu bata ke tanah dan Malini pun membuang kelapa ke tanah juga." After that the accused entered the house and the deceased went to SP6.
>
> Inside the house, the accused asked SP7 to inform the estate clerk that he would be taking leave on 20 August 2001 and when SP7 returned about 20 minutes later, SP7 saw SP6 and the deceased seated inside the family car parked in the garage in front of the house.
>
> Inside the house, the accused said to SP7 that he wanted to fill his motorcycle with petrol and asked SP7 to fetch some petrol. SP7 filled a small container with petrol decanted from a green container and placed a small container of petrol on the table.

A The accused took that container of petrol and walked out of the house and had a lighter in his hand. SP7 followed the accused but at the distance of about 10 feet. The accused opened the rear left door of the said car and tossed petrol into the said car with SP6 and the deceased seated inside. The accused struck the lighter. The accused was burnt on his chest and "lepas sapu (api) B dengan tangan, OKT terus masuk rumah". According to SP7, he was just 15 feet away and there were no other persons near the said car.

Before that, at some time between 2.00 - 3.00 p.m, SP6 and the C deceased had moved from the front pavement to the family car parked in the said garage, as the deceased was afraid that the accused would become further enraged if passers-by were to splash them with kunyit water. The deceased was seated on the left while SP6 was seated on the right of the rear passenger seat.

D SP6 was facing the deceased at that time and noticed a person passing by on the left side of the car and then detected a strong smell of the petrol. When she turned her head towards the deceased, the lower body of the deceased was on fire. She dragged the deceased out of the car through the right rear door and called SP7 to fetch water. Thereafter the car and the garage E were on fire.

SP7 proceeded to fetch water after the accused had entered the house. At that time SP6 and the deceased were in the front of the house. SP6 and others who had come to help, then put out F the flames on the deceased. There were burns all over the lower body and hands of the deceased.

SP5 a neighbour, drove the deceased and SP6 to a private clinic at Layang-Layang, there the doctor advised the deceased to be admitted to the general hospital. SP5 drove them to Kluang G Hospital, where the deceased was admitted to ICU. Later, the deceased was transferred to JB Hospital and passed away on 24 August 2001.

[4] On the drinking habits of the respondent, SP6 stated that H on the fateful day the respondent had between 11am and 12.30pm consumed the content of the bottle (exh. P4C) and SP7 had affirmed that the respondent had also consumed the content of a bigger bottle at 7.30pm on the day before. SP7 further stated that "saya biasa nampak ayah minum dari botol besar" and I had occasion to witness the respondent drinking for three continuous days and that in a month the accused would consume the content of 10 to 15 similar bottles.

[5] During cross-examination it was further elicited from SP6 that the respondent "selalu marah lepas minum." That after drinks the respondent would fall asleep and when sober was nice but would not remember his erstwhile manners whilst under the influence of alcohol. SP7 also disclosed that after drinks the respondent would be angry if the deceased watched television and "kalau tidak mabuk ayah baik, tidak marah. Lepas mabuk ayah sendiri kata tak ingat hal marah-marah. Tiap kali minum perangai ayah memang ganas, marah mulut bising. Masa ganas ayah pernah pukul saya. Kadang-kadang halau kita keluar dari rumah dan kunci rumah. Ayah juga cari gaduh dengan jiran. Kadang-kadang membuang makanan yang sedang dimasak. Lepas mabuk ayah tak boleh ingat apa jadi."

[6] From the evidence of a long time neighbour, SP5 it was disclosed that on hearing a loud cry for help from SP6, he saw a car on fire with the deceased inside and he helped dragged the deceased out of the said car and put out the flames on the deceased's stomach and drove the deceased to the hospital. While so doing, SP5 noticed the respondent standing in front of his house and watching the whole episode. In his own words, SP5 stated: "OKT berdiri tengok sahaja." SP5 however could not say whether the respondent was then drunk and whether the respondent was also injured in the incident.

[7] Apart from the abovementioned, the prosecution called seven other witnesses comprising of five police personnels, a government chemist and a government photologist.

[8] At the end of the prosecution's case, the learned trial judge found a *prima facie* against the respondent and called upon him to enter his defence. The respondent chose to give evidence on oath and also called his two younger brothers to testify on his behalf.

[9] We have considered the learned trial judge's decision in concluding that a *prima facie* case has been established and this was rightly conceded by the learned deputy public prosecutor. Hence we reserve further comments on the issue.

[10] After having heard the evidence of the defence, the learned trial judge found that the respondent have successfully raised the defence of intoxication under s. 85(2) of the Penal Code and with the finding that the respondent committed the act and further

A directed that the respondent be held in safe custody in a suitable place of detention, at the pleasure of His Royal Highness, the Sultan of Johor. Against the said order, the public prosecutor has filed this present appeal.

B **The Appeal**

[11] The crux of the appellant's contention in this appeal is that the learned trial judge erred in law and in fact in holding that the respondent has successfully raised the defence of intoxication and fulfilled the pre-requisites of the defence as enshrined in ss. 85 and 86 of the Penal Code. It is further submitted that the learned trial judge also erred in failing to consider and/or take into account that there was no cogent evidence to support the finding that the respondent was so intoxicated to the extent of not knowing that his acts were wrong in law.

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[12] In this instance, it behoves upon us to consider the defence evidence. In his defence, the respondent testified that he was not aware of his acts and did not know that what he did was wrong. He also does not know the consequences and the nature of his E acts. The respondent's evidence in defence as elicited from the trial judge's decision goes as follows:

> On 19 August 01, he was in his house. That morning, after he got up, he began to drink. At 9.00 a.m., he woke up SP6, SP7, F the deceased, and Kishen. He asked the deceased to help SP7 who would be in Form 3 in 2002, with his studies and not to do any housework. The deceased ignored him and proceeded to help SP6 with the laundry. At 9.45 a.m., he asked the deceased why she was doing other work. The deceased did not answer. He said to the deceased, "kalau saya bangun, saya datang ke sana baru G awak tahu". He wanted to scold the deceased. He frequently quarreled with SP6, but his relationship with his children was good. He had never struck his children. At 10am, the deceased walked out of the house and slammed the door after her. He followed the deceased. He scolded the deceased. He asked the H deceased why she would not do his bidding, to help her brother with his studies. "Saya angkat batu dan kata saya baling dan baru awak tahu." He wanted only to frighten the deceased. He had no intention to throw that stone. The deceased picked up a coconut on the ground and said "kalau ayah baling batu dia akan baling kelapa muda." Neighbours were watching the proceedings. Feeling I ashamed, he tossed the stone onto the ground and entered the house. "Saya masuk rumah, dan minum samsu, sambil merokok dan tengok tv." He enquired from SP7 as to what the deceased

was then doing. SP7 informed him that the deceased had moved to the front of the house. He was sad that the deceased had disobeyed him. He went back to bed. He woke up at 12.00 p.m. He started to drink again. It was usual for him to drink on Saturdays and Sundays. At about 12.30 p.m., he asked SP7 to inform the estate clerk that the following day he would take leave, as he had drank too much. He had drunk the content of a whole big bottle. He was drunk. He fell asleep. He woke up at about 2.45 p.m. SP7 told him that he (SP7) had informed the estate clerk. He asked SP7 to fill a small container with petrol stored in the prayer room. SP7 did so but said that he was afraid to fill the motorcycle with petrol from the container. He took that container of petrol and filled his motorcycle with petrol. In the process, he smeared his hands with petrol. He asked SP7 to wipe the remnants of petrol on the petrol tank. But before he did that, SP7 informed him that there were many red ants in the area of the garage. "Shatesh kata tuang sedikit petrol di kawasan semut, dan kasi bakar. Selepas Shatesh masuk ke dalam rumah, saya pergi ke garaj lalu tuang petrol, tuang banyak petrol, tinggal sedikit sahaja petrol dalam tong. Lepas tuang saya pergi duduk di tempat longkang rumah saya, dan terus bakar dengan lighter. Tangan kiri saya pegang tong kecil dengan petrol. Semasa saya petik lighter ada letupan, saya terus campak tong kecil ke tempat garaj. Saya fikir tong kecil boleh lepas bawah kereta, sebab tong itu kecil dan saya fikir boleh lepas. Dua tangan saya, sebelah kanan badan saya dan muka saya sebelah kanan terbakar. Saya terus pergi ke bilik air, untuk sejukkan badan. Pada masa itu saya melihat isteri sedang makan nasi di dapur. Bilik air dengan dapur ada dekat-dekat. Lepas saya mandi saya dengar jeritan isteri, saya terus lap badan dengan tuala. Masa itu saya ingat kereta yang terbakar. Lepas itu saya bawa dua baldi dengan air. Pada masa itu pintu tertutup, kedua-kedua motor ada di dalam rumah. Saya tidak tahu siapa yang masukkan kedua-dua motor ke dalam rumah. Saya buka pintu dan melihat kereta saya sedang bakar. Banyak kuat api. Sebelah rumah ada jiran menjerit apa pasal kasi bakar anak. Jiran juga kata, lagi minumlah, lagi kasi bakar anaklah. Saya jawab kereta yang terbakar, mengapa kata anak yang terbakar. Pada masa itu beberapa orang cuba padam api. Pada masa itu saya melihat Malini dan isteri sedang menangis di tepi jalan. Semasa saya tuang petrol saya tidak tahu Malini berada di mana." When he tossed the petrol, "saya tidak tahu samada ada orang dalam kereta."

The learned trial judge's recording of the respondent's defence goes on to say:

A On his drinking habit, the accused said that he had drinks that previous Friday after work, on the previous Saturday after 8.00 p.m., when he consumed a half bottle of alcohol, that he would have drinks every Saturday and Sunday and on every payday,

B and that he would drink slowly, but he would become quickly intoxicated. On 19 August 2001, he was very drunk. The accused added that he knew little of the incident and that most of what he knew had been told to him, whilst he was under remand, by SP6 and SP7. He could only recollect the events in the C morning. Saya ada memberi ID13 kepada polis. His testimony on the events in the morning was also based on what he heard, whilst he was under remand at the Layang-Layang Police Station, from SP7 and from what he heard when he visited the deceased in hospital on 21 August 2001. "Saya hanya ingat saya menyuruh Malini mengajar adik, itu sahaja saya boleh ingat. Minum arak, D saya ingat. Saya ingat saya minum sampai pada 10.00 pagi. Saya ingat semua kejadian pada pagi. Selepas minum saya tidak boleh ingat kelakuan saya. Semasa itu saya tidak tahu perbuatan saya samada salah. Saya juga tidak tahu akibat perbuatan. Saya hanya fikir bakar semut sahaja. Saya tidak tahu sifat perbuatan saya.

E **[13]** Two other witnesses were called by the respondent in his defence. DW2, his younger brother, came to the scene upon being informed of the incident and found the respondent lying on the floor in the hall. To use his own words, he said the respondent "tidak sedar". SP7 was crying and told him that the deceased had F been taken to the hospital. DW2 then took SP7 to his brother's house and returned 10 - 15 minutes later. He tried to wake the respondent up and states "Saya kejutkan OKT, OKT tak sedar macam mabuk-mabuk. Lepas itu saya marah OKT, tanya apa sudah berlaku pada kereta dan anak. Saya tanya mana anak, OKT G tak jawab. OKT buka mata dengan separuh-separuh."

[14] Another younger brother of the respondent, DW3 was his last witness. At about 9pm on the fateful day, on being informed that the police was in the house of the respondent, he proceeded H to the house and found the respondent sleeping in his bedroom. After several attempts he managed to wake him up. The respondent could not tell him the whereabouts of the deceased and upon being asked as to why he was not at the hospital, the respondent simply replied he had no transport. DW3 also testified I that the respondent cried after he was handcuffed by the police

and was asking him why he was arrested. On the drinking habits of the respondent, DW3 stated that "Saya pernah melihat OKT semasa mabuk. Bila mabuk OKT minum cepat. Kalau minum banyak OKT terus tidur. Semasa mabuk OKT boleh kawal diri sekejap sahaja. Lepas mabuk OKT tak ingat apa yang telah berlaku."

[15] Having considered and analysed the evidence of the defence, the learned trial judge found that the respondent was under the influence of alcohol and was drunk at the time when he committed the act and concluded that there was doubt as to whether the respondent in his intoxicated state could have formed the necessary intention or knowledge to constitute the offence of murder.

[16] The issue arising in the instant appeal is simply whether the respondent was intoxicated and whether in that intoxicated state he could have formulated the necessary intention or knowledge to commit the offence of murdering his own daughter.

[17] The law on intoxication as stated in *Francis Antonysamy v. PP* [2005] 2 CLJ 481 reposes upon the court a consideration of the accused's conduct prior to, at the time of and after the commission of the offence. In the concluding paragraph of the said case, Augustine Paul, JCA (as he then was) delivering the judgment of the Federal Court stated:

> It must be observed that what is in issue in a defence of intoxication is the state of mind of the person concerned in order to determine whether he could have formed the necessary intention. The best evidence to establish his state of mind is his conduct prior to, at the time of, and after the offence as different people react differently to the same blood alcohol level. Needless to say scientific evidence is significant to explain the conduct of the person. In other words it will corroborate the evidence of conduct. Its absence cannot therefore be fatal.

(See: *Chan Kwee Fong v. PP* [2010] 3 CLJ 671, *PP v. Kenneth Fook Mun Lee & Another Appeal* [2006] 1 CLJ 499).

[18] We are of the view that the learned trial judge has given full consideration of the evidence of the conduct of the respondent through the testimony of both the prosecution and the defence

witnesses in reaching the conclusion that there was doubt as to whether the respondent in his intoxicated state could have formed the necessary intention or knowledge to constitute the offence of murder. Despite the absence of any medical evidence as to the level of intoxication of the respondent, there are in our view sufficient evidence to support the learned trial judge's finding.

[19] We find no justification to disturb the learned trial judge's finding that "the respondent was most abnormal in his manner for if he had any realisation of his erstwhile act and the consequences thereof, then his manner could not be anything close to normal, could be seated in the hall as if nothing had happened". The behavior of the respondent was not only odd but strange taking into account the evidence of SP5 that the respondent was standing in front of the house and watching the proceedings while SP5 was helping SP6 to drag the deceased to safety out of the car. DW2 testified that when he came over, the respondent was lying on the floor in the hall of the house and he said the respondent "tidak sedar macam mabuk-mabuk." On being questioned by DW2 as to the whereabouts of his daughter, the respondent gave no reply and only "buka mata dengan separuh-separuh." In our view this is a clear indication that the respondent was not conscious of his surroundings.

[20] The testimony of SP5, SP6 and SP7 as part of the prosecution case clearly indicated that the respondent was under the influence of alcohol at the material time of the offence. Their evidence that the respondent was drunk could not be ignored or discarded simply because of the absence of scientific evidence. Other surrounding factors must be considered and were indeed considered by the learned trial judge. The totality of the conduct of the respondent was not consistent with one of guilt. The learned trial judge had asked the very pertinent question of what was the state of intoxication of the respondent?

[21] Section 85(2)(b) of the Penal Code provides a defence of intoxication to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

[22] Section 86(2) of the same provides that "Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence." A

[23] In *Chia Chan Bah Alias Chiah Ah San v. Rex* [1938] 1 LNS 12; [1938] 7 MLJ (SSR) 147, the judgment of the Court of Criminal Appeal, consisting of Mc Elwaine, CJ, Terrell and Horne JJ at p. 148 states as follows: B

> Where the defence is insanity the onus is on the accused to prove that he was probably insane. This onus is placed upon him by section 106 of the Evidence Ordinance, but the law does not require an accused person setting up an exception such as insanity as a defence to prove that exception beyond reasonable doubt. It is sufficient if he tips the scale of probability in his favour - if he induces in the mind of the jury a feeling that he probably was insane though the jury may have its doubts whether he really was insane. As it is put in *Rex v. Sodeman* [1936] 2 All England Reports, 1138 the onus on an accused in setting up such an exception as insanity is no higher than the onus on a plaintiff or defendant in a Civil Suit. See too *Lim Tong v. The Public Prosecutor*, 7 MLJ 41. C D E
>
> This onus which the law places on an accused person may be discharged by the Crown evidence: it is not incumbent on the accused to discharge it by his own evidence or by that of witnesses called by him. F

[24] In our view, the evidence given by the respondent in his defence and considering the totality of the evidence together with that proffered by the prosecution, the respondent has discharged the burden placed on him. G

[25] We have perused and given due consideration to the grounds given by the trial judge. In our view the learned trial judge has not erred in his assessment of the evidence and on the application of the correct principles of law. Taking in its totality, we find no reason to interfere with the finding. H

[26] In the light of the above, we dismiss the appeal and confirm the decision of the High Court. I